IN THE

Supreme Court of the United States

No. 71-5172

CHARLES O. DUKES,
Petitioner,

v.

WARDEN, CONNECTICUT STATE PRISON,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT

REPLY BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

When an actual conflict of interest on the part of his attorney is apparent on the face of the record, does the petitioner have the burden of proving the quantum of prejudice he suffered as a result thereof?

ARGUMENT

THE ACTUAL CONFLICT OF INTEREST ON THE PART OF PETITIONER'S ATTORNEY, APPARENT ON THE FACE OF THE RECORD, CONSTITUTES A SUFFICIENT SHOWING OF PREJUDICE TO WARRANT SETTING ASIDE PETITIONER'S PLEA OF GUILTY SINCE HIS REPRESENTATION OF PETITIONER WAS NOT AS EFFECTIVE AS IT MIGHT OTHERWISE HAVE BEEN.

The thrust of respondent's argument throughout his brief is that the petitioner's plea of guilty should stand because he failed to show that he was prejudiced by the remarks made about him by his counsel. Stated another way, this argument seems to be that it does not matter what petitioner's attorney said about him, if he cannot show that these remarks hurt him, he cannot be heard to complain about them. Petitioner respectfully contends that the clear trend in the law is to guarantee that an accused has the undivided loyalty and service of his attorney and that it is up to the trial judges "to strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *McMann v. Richardson,* 397 U.S. 759 (1970).

The touchstone against which virtually all conflict of interest decisions have been measured is that enunciated by this court in *Glasser v. United States*, 315 U.S. 60, 75-76 (1942), when the court said:

> To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. *The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.* (Emphasis added.)

The respondent contends that what constitutes "sufficient prejudice" to amount to a conflict of interest is unclear. He indicates that some courts have required a "strong showing"

of prejudice relying on *Lott v. United States*, 218 F.2d 675 (5th Cir. 1955); *United States v. Burkeen*, 355 F.2d 241 (6th Cir. 1966), cert. den. sub. nom. *Matlock v. United States*, 384 U.S. 957 (1966); *Lugo v. United States*, 350 F.2d 585 (9th Cir. 1965). (Respondent's Brief, p. 11.) However, since these cases were decided, the courts have in the main looked to see whether the representation of counsel might have been more effective but for the conflict of interest and let it go at that.

In *United States v. Gougis*, 374 F.2d 758, 761 (7th Cir. 1967) the defendant and a co-defendant, one Philips, were both represented by the same court-appointed attorney. Some of the most damaging testimony against the defendant came from Philips. The Seventh Circuit Court of Appeals found that a conflict of interest existed and used as a guideline the rule from *Glasser, supra*, 315 U.S. at p. 76, that the "representation . . . was not as effective as it might have been" if the conflict did not exist, saying:

> It seems clear, and we so hold that the representation of Gougis was not as effective as it might have been had his counsel not been required by the trial court to also represent Philips. Gougis was thus denied his right to the effective assistance of counsel guaranteed by the Sixth Amendment. This error alone requires that the verdict be set aside as to defendant Gougis and that he be given a new trial.

In *United States ex rel. Williamson v. LaVallee*, 282 F. Supp. 968, 973-74 (E.D. N.Y. 1968), the court specifically rejected the rule requiring a strong showing of prejudice and held that the defendant need show only that a genuine conflict of interest existed and not that some specific prejudice resulted therefrom, relying on *United States v. Gougis, supra*; and *Sawyer v. Brough*, 358 F.2d 70 (4th Cir. 1966).

Respondent argues that true conflict of interest cases arise in situations like those in *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967), "where one lawyer represents co-defendants in a trial and the possibility exists that he may

have to make decisions in the course of the trial inimical to the interests of one defendant in order to benefit the other" (Respondent's Brief, p. 11). However, the law is to the contrary. In *Whitaker v. Warden, Md. Penitentiary*, 362 F.2d 838 (4th Cir. 1966), the complainant was the defendant's own wife who accused him of committing statutory rape on her eleven-year-old daughter by another marriage. After he was arrested, Mrs. Whitaker informed her aunt, Mrs. McElfish, of what had happened. An attorney, Mr. Manges, was hired by Mrs. McElfish and he looked to her for his fee. The two women then told Manges they wanted the case disposed of as quickly, quietly and with as little notoriety as possible. Upon learning that Whitaker had signed a confession, Manges tendered a guilty plea on his behalf one week after his arrest, which plea was later changed to nolo contendere. Evidence was taken during the course of which Manges limited his examination to two questions. The Court of Appeals overturned the conviction on the ground that Manges was serving interests that conflicted with those of his client, saying:

> While the conclusion that counsel was not single-mindedly devoted to Whitaker's defense is based primarily upon representation afforded immediately after conviction, we think the conviction should be set aside. We cannot say that representation of Whitaker prior to his conviction was unaffected by the circumstances of counsel's employment and the admonitions of Mrs. Whitaker and Mrs. McElfish. *All that we need determine is that Manges was serving an interest or interests which conflicted with that of Whitaker; we need not delineate any specific prejudice to Whitaker flowing from his representation.* See *Glasser v. United States*, 315 U.S. 60, 75-76, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Sawyer v. Brough*, 358 F.2d 70 (4 Cir. 1966). [Emphasis added.]

And in *United States ex rel. Miller v. Myers*, 253 F. Supp. 55, 57 (E.D. Pa. 1966), the court granted a petition for habeas corpus because the attorney for the defendant, who was accused of burglary, had also represented the victim of

the alleged burglary in an unrelated civil matter. The court specifically noted that it did not ascribe to defendant's attorney anything but the highest of motives, but felt that the hazards resulting from a conflict of interest were so great as to warrant the issuance of the writ of habeas corpus saying:

> We are dealing here with the life of an individual who stood to be incarcerated for 20 years. His right to counsel under the Constitution is more than a formality, and to allow him to be represented by an attorney with such conflicting interests as existed here without his knowledgeable consent is little better than allowing him no lawyer at all. See *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). This situation is too fraught with the danger of prejudice, prejudice which the cold record might not indicate, that the mere existence of the conflict is sufficient to constitute a violation relator's rights whether or not it in fact influences the attorney or the outcome of the case.

In a thorough and well reasoned opinion the Court of Special Appeals of Maryland came to the same conclusion as the Court of Appeals for the Seventh Circuit in *United States v. Gougis, supra,* that the only prejudice that need be found is that the representation of counsel "was not as effective as it might have been . . ." *Glasser, supra,* 315 U.S. at p. 76. In *Brown v. State*, 10 Md. App. 215, 269 A.2d 96, 103 (1970), the court looked to the Maryland rule laid down in *Pressley v. State*, 220 Md. 558, 155 A.2d 494 (1959) that the conflict had to be actual or "imminently potential". It then harmonized the *Pressley* rule with that enunciated in *Glasser, supra,* as follows:

> "This Court feels the better position, in line with both *Pressley* and *Glasser*, is that there must be a showing of some prejudice but the prejudice need only be slight before relief is required. While *Pressley* requires a showing of prejudice. *Glasser* is written in terms too specific to require more than slight prejudice. Hence, the Supreme Court granted a new trial since the representation of Glasser "was not as effec-

> tive as it might have been * * * " Thus, this Court holds that once an actual or imminently potential conflict of interest is shown, the only demonstration of prejudice that is required is that counsel was not as effective as he might have been had the conflict not existed."

From all of the foregoing it is clear that the burden is not on the petitioner to prove the quantum of prejudice he suffered as a result of his attorney's conflict of interest. He need only show that the conflict of interest existed and that his counsel's representation therefore was not as effective as it otherwise might have been. In the present case petitioner has done both.

The conflict of interest on the part of his attorney is apparent on the face of the record in light of the remarks made at the time of sentencing. As the court noted in *Commonwealth v. Cullen*, 216 Pa. Super. 23, 260 A.2d 818, 820 (1970), such damaging remarks at the time of sentencing raise a "serious question with respect to [counsel's] representation on the plea itself." Was Mr. Zaccagnino's representation "as effective as it might otherwise have been?"

It must be remembered that throughout his representation, Attorney Zaccagnino or his partner had been urging the petitioner to plead guilty. Both at the time of plea and at the time of sentencing the petitioner attempted to obtain a continuance to hire a new lawyer. It should have been apparent to both Judge Johnson and Judge Devlin that the petitioner did not want to retain Mr. Zaccagnino as counsel.

Respondent argues that Attorney Zaccagnino's remarks were harmless since everything he said was already contained in the presentence report. (Respondent's Brief, pp. 3, 9.) That argument is specious. What did petitioner need a attorney for at all? Why not just hire the probation officer who did the presentence report? If anything, an accused, who finds himself confronted with matters in

aggravation which have been presented to the judge who is about to impose sentence by the presentence investigator, has all the more reason to need an attorney who will vigorously and credibly argue his cause. If nothing else Mr. Zaccagnino's credibility insofar as Judge Devlin was concerned must have been somewhat tarnished since he had only two weeks earlier laid the blame for the conduct of the Baker and Sejerman girls on this petitioner while arguing for leniency for the two girls before this very judge.

Respondent also makes much of the fact that petitioner received the sentence that he bargained for. (Respondent's Brief, pp. 4, 6, 12.) That argument presupposes that the "bargain" was binding upon the trial judge. Surely the respondent does not claim that to be the case. However, he does argue that the trial judge could not have given a lesser minimum sentence since he gave the mandatory statutory minimum under the law as it then existed. Conn. Gen. Stats. (Rev. 1958) § 19-265. But obviously the maximum term is of equal importance to the petitioner as the minimum term. After all the days in prison at the end of one's sentence are just as long as those at the beginning.

In the main, respondent's brief indulges in "nice calculations as to the amount of prejudice" that petitioner suffered as the result of his attorney's conflict of interest. This is the very indulgence which this court refused to make in *Glasser, supra*. Therefore, petitioner urges this court to look to the actual conflict of interest that existed, and not try to guess the amount of prejudice resulting therefrom.

Respectfully submitted,

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